

criteria other than competitive presence for BLES in the relevant geographic area must be considered, the presence of competitors is viewed by OTS as so fundamental to a competitive declaration as to constitute a threshold requirement. OTS St. No. 1, p. 16. Since competitive presence for BLES is not ubiquitous in BA-PA's service territory, and since BA-PA presented its case only on an "all or nothing basis", BA-PA's Petition should not be granted with respect to BLES.

¹ While the 192 and 193 exchange numbers were treated as proprietary by OTS, BA-PA disavowed this proprietary status by placing these numbers in the public record. Tr. 503; BA-PA St. No. 1.1, p. 25.

² This percentage is, again, extremely generous to BA-PA as it does not reflect the possibility that a CLEC combines a ported number to an unbundled loop to serve one business access line.

The OTS study demonstrates, beyond any doubt, that there is no current facilities based competition in at least one-half of all BA-PA wire centers. This comes as no surprise considering that facilities based competition (except where the competitor installs its own entire network) is impossible without collocation, and collocation is not available in most BA-PA wire centers.

The OTS study also demonstrates that there is little facilities based competition anywhere in BA-PA's service territory. Because the OTS study does not count customers who are served by facilities based carriers who use their own facilities exclusively, it obviously underestimates the CLECs' market share. Nevertheless, even the data provided by BA-PA in Appendix I to its main brief shows that its largest facilities based competitors serve only [BEGIN PROPRIETARY] [REDACTED] END

PROPRIETARY] lines. However, BA-PA itself served [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] as of the beginning of this year. (OCA St. 1.0 at 21-22).

BA-PA contended that Mr. Kubas' findings as to lack of competition in 192 or 193 BA-PA exchanges are inaccurate because Mr. Kubas did not consider resale or facilities-based competition that is allegedly present in some of these exchanges. Also, BA-PA belittled Mr. Kubas' study by characterizing the 193 exchanges as containing only 10% of BA-PA's business access lines. (BA-PA St. 1.1 at 25; BA-PA St. 4.1 at 11). These arguments are meritless for the following reasons. As discussed above, while resale is a relatively inexpensive way to compete, it is ineffective in restraining BA-PA price increases, and may not be a viable way to enter the market in an environment where the only facilities based provider, BA-PA, can change retail prices at will. Second, there is only a negligible amount of resale being provided today, casting further doubt upon its viability as a competitive threat. Third, as also discussed above, even if you count all of the lines served by the largest facilities based CLECs, BA-PA's market share exceeds 90%. Fourth, there are no collocation facilities in two-thirds of BA-PA wire centers; facilities based competition is not practical in those wire centers without collocation. Finally, 10% of BA-PA's [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] still leaves roughly [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] without any competitive presence.

In further response to Mr. Kubas, BA-PA, for the first time in rebuttal, attempted a competitor presence analysis targeted to wire centers and density cells. (BA-PA St. 4.1, Tables 1 and 2). BA-PA witness Dr. Taylor examined Mr. Kubas' 193 exchanges (later revised to 192) and concluded, as indicated in his rebuttal Table 1, that [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of these exchanges had resale presence, [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] also had CLEC facilities or collocation presence, and [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] additional exchanges had CLEC facilities or collocation presence but no resale, for a total of [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] exchanges with purported competitor presence out of the 193 identified by Mr. Kubas. (BA-PA St. 4.1, Table 1). Based upon Table 1, Dr. Taylor concluded that all but five percent of BA-PA's business access lines are in wire centers with a competitive presence. (BA-PA St. 4.1 at 12; Tr. 1332). Aside from the questionable nature of Dr. Taylor's methods of determining where competitors are "present" (OTS M.B. at 10-21), these arguments are meritless for the reasons set forth in the immediately preceding paragraph. Even these figures establish that, by Dr. Taylor's standards for "competitive presence," there are roughly 130 wire centers (about 25% of the total) with no competitive presence. The five percent of the access lines without a competitive presence amount to roughly [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY] of BA-PA's [BEGIN PROPRIETARY] [REDACTED] [END PROPRIETARY]. Obviously, those customers in wire centers without a competitive

presence would be most likely to suffer rate increases if this petition is granted.

While there is other evidence in the record concerning competitive presence, it is not necessary to further analyze it, as it does not alter the reality that BA-PA possesses an overwhelming share of the market for business local exchange service in Pennsylvania. Nor does that evidence alter the fact that BA-PA retains its overwhelming market share a full five years after Chapter 30 of the Public Utility Code opened the local exchange market in Pennsylvania to competition, and two and one-half years after the Telecommunications Act of 1996 further opened the market.

BA-PA contends that the Commission should overlook its large market share. It contends that a large market share can be a liability and that growth is a more important measure of the competitors' ability to thwart attempts by BA-PA to raise prices. (BA-PA R.B. at 11-14). It asks the Commission to decide in its favor because resellers could enter the market if BA-PA raised rates, even though resellers have not done so to date. (BA-PA St. 1.1 at 25). I do not find these arguments to be persuasive.

Implicit in BA-PA's argument that the Commission should overlook its large market share is the notion that competitors could rapidly enter any of its local exchange markets if BA-PA raised rates in that market. Clearly that is not the case for facilities based carriers in the two-thirds of BA-PA wire centers where there are no collocation facilities. That leaves resellers. As previously discussed, for a variety of reasons, it

is not clear that resellers alone will be an effective restraint on BA-PA's ability to raise rates in the absence of regulation.

BA-PA has cited no case where an administrative agency has deregulated a dominant company with a market share in excess of 90% on the theory that there are some competitors who have gained a little market share, and who might be able to gain more if the former monopolist raised prices. As a matter of historical precedent, the FCC did not declare AT&T to be non-dominant in the toll market until 1995 "approximately 8 years after the general completion of interLATA equal access, at which point AT&T's share of access minutes was just 55 percent. (AT&T St. 1.1 at 5). See In re Motion of AT&T Corp. to be reclassified as a Non-Dominant Carrier, 11 F.C.C.R. 3271 (Oct. 23, 1995); Long Distance Market Shares, Third Quarter 1997, FCC Common Carrier Bureau, Jan. 1998, at 3. I do not cite this case to suggest that 55% market share is a magic figure. The FCC's ruling merely shows that BA-PA's request, to have all business services declared competitive, while holding a market share in the BLES market in excess of 90%, borders on the ridiculous.

There is one other point that must be made about BA-PA's contention that competitive conditions are such that all of its business services may be declared competitive with no danger to either the consumers or the nascent competition. Simply put, if one buys this argument for business services, one must also accept that the residential market is competitive, and BA-PA's service for it should also be deregulated. Obviously, the facilities based carriers and resellers who are now serving the

business community are also "potential competition" for BA-PA in the residential market. Because any CLEC residential market share is undoubtedly small, the "growth" in that share must be phenomenal. Some carriers are marketing "bundled" local and toll service to residential customers, as well as Internet access. Finally, in the face of these arguments, the Commission should overlook BA-PA's own market share for residential local phone service. Plainly, all of BA-PA's arguments that the entire business market is competitive can be applied with equal force to the residential market. Yet, I cannot imagine anyone seriously contending (or believing) that the residential local telephone market is competitive. Frankly, if business service is declared competitive today, it will not be surprising to see a similar petition for residential in the near future.

For the foregoing reasons, I conclude that BA-PA has not proven that it faces effective competition for business local exchange service throughout its service territory. Because that issue is at the heart of this case, I also conclude that BA-PA has not shown that its telecommunications services to businesses throughout its service territory should be declared competitive. Accordingly, I recommend that this petition be denied.

Because I conclude that BA-PA has not shown that it faces effective competition throughout its service territory, it is unnecessary to address the other issues raised by the parties. Nevertheless, I will address certain issues, in brief. I will also address BA-PA's request for partial relief.

VII. Ease of Market Entry.

Strictly as an empirical matter, there cannot be ease of entry. As discussed above, fully five years after the passage of Chapter 30 of the Public Utility Code, BA-PA retains over 90% of the business local telecommunications market in its service territory. If entry is easy, where are the competitors? The CLECs point to two factors: the prices set by the Commission for resale and UNEs, and problems encountered in dealing with BA-PA. As I have previously indicated, I will not discuss the pricing issues. Whether due to prices or other factors, there is precious little competition in BA-PA's service territory. Moreover, UNE prices will be reviewed in the upcoming MFS Phase IV. Problems arising from the interactions between the CLECs and BA-PA are another matter.

The CLECs enumerate several problems arising from BA-PA's Operation Support Systems ("OSS"), including preordering, ordering, maintenance, repair and billing. Having heard this litany of complaints during several cases over the past two and one-half years, and confident that the Commission itself also has heard the litany multiple times, I will not repeat it here, but refer the reader to some of the briefs for examples of the problems: CTSI brief at 5-10, MCI main brief at 34-57. BA-PA offers several responses to those claims.

BA-PA claims that because its competitors are entering the market despite any problems with its OSS, the problems must be minimal. (BA-PA R.B. at 33, 38). Frankly, I am unsure what data BA-PA is relying upon to support this claim. As discussed,

the credible market share data shows that competitive entry has been minimal.

BA-PA also argues that the complaints are exaggerated, that some of the problems are caused by the CLECs themselves, that BA-PA is solving many of the problems, and that OSS is largely irrelevant to service provided by facilities based CLECs to large volume customers. (BA-PA R.B. at 33-43). Considering that I recommend denial of this petition for other reasons, it is unnecessary to discuss each of these points in detail, but it may be useful to discuss some points to provide guidance for the future.

While the CLECs are undoubtedly responsible for some of the problems that have arisen, it appears to be the case that BA-PA is dragging its feet in this area. It has been two and one-half years since the passage of the Act, and five years since the passage of Chapter 30. I have heard complaints from CLECs about these problems during several cases over the past two years. At this late date, it is unacceptable for BA-PA to provide the CLECs' programmers with inaccurate or insufficient information of the kind that they need to construct the CLEC side of electronic interfaces that they share with BA-PA. (NCI St. 4 at 25-26). It is equally unacceptable for BA-PA to make substantial changes to its electronic interfaces just as the CLECs are preparing to use them. (NCI St. 4.0 at 25-26). These kinds of problems suggest that BA-PA is making somewhat less than its best effort to meet this critical need. While developing these interfaces is undoubtedly a major task, it has been several years now.

Similarly, while it is true that OSS is less important for service provided by a facilities based CLEC to large volume customers, it is also true that certain forms of OSS are necessary even for these customers. Obviously of prime importance is that CLEC customers be included in the phone book. As described in CTSI's brief at page 7, BA-PA has omitted CLEC customers from phone directories published in February 1998 for Wyoming Valley and in May 1998 for Harrisburg. While it is possible to accept the first omission as an understandable mistake, it stretches one's credulity to think that a second mistake of this serious nature several months after the first was purely coincidental.

Lastly, it seems no coincidence that BA-PA is most responsive to these problems when it is asking for Commission approval of a petition like this one, or its request to enter the interLATA toll market. (CTSI Brief at 6).

It is obvious that the CLECs have an incentive (their desire to enter the market) to fix these problems, while BA-PA has an incentive (retention of its enormous market share) to drag its feet. It seems that the Commission must establish, monitor, and enforce specific performance standards in this area for BA-PA. Independent monitoring of these processes is necessary to sort out the charges and counter-charges between BA-PA and the CLECs. Permanent monitoring is needed to ensure that these problems, once solved, do not reoccur after BA-PA has been allowed into the interLATA market, and once all markets have been declared competitive.

VIII. Ability Of Competitors To Offer Services At
Competitive Prices, Terms And Conditions.

This is another finding where empirical evidence (five years after the passage of Chapter 30 of the Public Utility Code, BA-PA retains over 90% of the business local telecommunications market in its service territory) directs an obvious answer. If competitors were able to offer all business services or other similar activities throughout BA-PA's service territory, one would expect that they would be doing so now. That clearly is not the case today.

IX. The Availability Of Like Or Substitute Services
Or Other Activities In The Relevant Geographic
Area.

This issue has been covered at pages 12-14 and 33, and further elaboration is unnecessary.

X. Coin Telephone and Internet Service Providers.

The coin telephone providers (CAPA) and the Internet service providers (ISP) differ from the CLEC parties in that they are both purchasers of retail service from BA-PA and competitors of BA-PA or a BA-PA affiliate. Because I am recommending denial of BA-PA's petition, it is unnecessary to address their specific claims.

XI. The Imputation Standard.

BA-PA proposes to meet the imputation test of Chapter 30 by aggregating the revenues for all of these services. That is, a proposed rate for a deregulated BA-PA business service would pass the imputation test as long as the revenues for all

business services exceed the revenues that BA-PA would realize from the sale of the associated basic service functions to its competitors. Thus, BA-PA would be free to offer some services at below cost as long as others were priced above cost. According to BA-PA, even a price of zero on a specific service would not flunk this test. (Tr. 339).

This is similar to the proposal that BA-PA made in its Petition Of Bell Atlantic - Pennsylvania, Inc. For A Determination Of Whether IntralATA Toll Service Is Competitive Under Chapter 10 of the Public Utility Code, Docket No. Docket No. P-00971293. My rulings here, if necessary, would be similar to, but not identical to, my rulings in my recommended decision signed March 30, 1998, in that case. In particular, I conclude that Commission precedent precludes the broad interpretation of the imputation test urged by BA-PA. In an order permitting several Bell toll calling plans to go into effect, the Commission required each of those plans to comply with an imputation safeguard. AT&T Communications of Pennsylvania, Inc., et al. v. Bell Atlantic- Pennsylvania, Inc., Docket Nos. R-00953394C002-0004, R-00953396C0002-0004, R-00953409C0001&C0004, entered July 9, 1997, at 12, 16 and 19. Also, in the Investigation to Establish Standards and Safeguards for Competitive Services, Docket No. M-00940587 (Order entered August 6, 1996), the Commission required BA-PA to perform an imputation analysis for its Centrex Extend service, despite BA-PA's claim that Centrex Extend is a "feature" and not a service. Competitive Safeguards, at 42.

Although I conclude that Commission precedent favors the interpretation urged by AT&T, MCI and OTS, I am not unsympathetic to BA-PA's view of this issue. In a fully competitive market, it would have, and would need, the freedom to price as it saw fit. I do not agree with BA-PA, however, that we are yet at that point. Given the fact that facilities based competition for BLES is non-existent in much of BA-PA's territory, adoption of BA-PA's imputation test would be an invitation to BA-PA to raise prices in areas without facilities based competition, while lowering prices in areas where it faced such competition. Again, this might not be a bad thing, if it attracted facilities based competitors to the areas where BA-PA had raised rates; however, facilities based competitors need collocation space which is not now available in two-thirds of BA-PA's wire centers.

XII. Partial Relief.

At the outset of this case, BA-PA took an all-or-nothing approach to its request for competitive designation of all business telecommunications service throughout its entire service territory. BA-PA now asks for the following partial relief in the event that the petition is not granted in full:

Second, even if the record did not support competitive classification of BA-PA's business telecommunications service for all business customers, which it does, it is undisputed that customers generating (conservatively) \$10,000 in annual BA-PA total billed revenues have competitive alternatives via dedicated access arrangements such as AT&T's Digital Link service throughout BA-PA's service territory. Competitors do not need BA-PA's UNEs or its OSS to reach these customers. If the Commission declines to grant BA-PA's petition in its entirety, nothing prevents it from

classifying as competitive telecommunications service the services provided by BA-PA to the obviously competitive segment of the business market of customers spending or committing to spend \$10,000 in annual BA-PA telecommunications revenue.¹

¹ The fact that BA-PA has not presented imputation results for this customer segment has no bearing on the Commission's ability to declare business telecommunications service competitive for these customers. Imputation is a forward-looking requirement, not, as the Supreme Court has recently confirmed, a precondition to competitive classification. *Pepowsky v. Pennsylvania Pub. Util. Comm'n*, 706 A.2d 1197 (1997). The imputation methodology presented by BA-PA complies with the statute and would be applied to any service declared competitive by the Commission.

(BA-PA R.B. at 2). The other parties oppose BA-PA's request for partial relief on various grounds.

A full reading of the record suggests that large volume customers, particularly in the urban areas of Philadelphia and Pittsburgh, have competitive alternatives to BA-PA. This is not surprising since these areas are where facilities based carriers such as TCG have located fiber rings and switches. (TCG St. 1 at 5). This is not surprising for another reason: it is much easier and more profitable for a CLEC to serve a customer large enough to utilize one or more high capacity lines because the CLEC does not need UNE loops from BA-PA. If a CLEC does not need UNE loops from BA-PA, this lessens (but does not eliminate) the reliance of the CLEC on BA-PA's OSS, which is one less barrier to serving the customer. (The CLEC still needs to get the customer listed in the local BA-PA phone directory; not always a trivial task, as previously discussed.) On balance, effective local phone

competition seems to be much more of a reality for large customers.

The record, unfortunately, contains too little evidence to determine with any degree of confidence the type or size of customer for which competitive designation would be prudent. In its reply brief BA-PA has suggested a break-point of \$10,000 in local revenue, because it calculates that AT&T offers its Digital Link service to customers who generate that little local revenue. (BA-PA R.B. at 2). Equally plausible demarcation points might be \$40,000 in revenue or 24 voice grade lines (corresponding to a single T-1 high capacity line). (Tr. 390-391, 1453-1454). The problem is that the record is insufficiently developed to make a decision on this issue. (I would not necessarily accept BA-PA's proposal based loosely on AT&T's Digital Link service because that service requires a customer to have a PBX, or Centrex service.) The record is also unclear as to the extent to which these services are actually available outside of the major metropolitan areas. Because it was BA-PA's duty to develop the record on these issues, I have no choice but to recommend denial of its request for partial relief. Frankly, had BA-PA originally presented a proposal limited to competitive designation for service to large customers, it might have been possible to try the case within a 180 day schedule, with at least a reasonable prospect for success. As it is, I cannot determine on this record where to draw the line, or what conditions to impose for partial relief.

CONCLUSION

For the reasons set forth above, I recommend that the Commission dismiss this petition.

RECOMMENDED ORDER

THEREFORE, IT IS ORDERED (subject to Commission approval):

That the Petition of Bell Atlantic - Pennsylvania, Inc. for a determination of whether the Provision of Business Telecommunications Services Is Competitive Under Chapter 30 of the Public Utility Code at Docket No. P-00971307 is denied and dismissed.

Date:

July 24, 1998

Michael C. Schnierle
Michael C. Schnierle
Administrative Law Judge